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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

May 12, 2004

Honorable Deborah Taylor Tate
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

**IN RE: UNITED CITIES GAS COMPANY, a division of ATMOS ENERGY
CORPORATION INCENTIVE PLAN ACCOUNT (IPA) AUDIT UNITED
CITIES GAS COMPANY, a division of ATOMS ENERGY
CORPORATION, PETITION TO AMEND THE PERFORMANCE
BASED RATEMAKING MECHANISM RIDER
CONSOLIDATED DOCKET NOS: 01-00704 and 02-00850**

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Consumer Advocate and Protection Division's Motion to Compel Discovery. Please file same in this docket. Copies are being sent to all parties of record.

Should you have any questions, please contact me at 615-741-3533. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Phillips".

Timothy Phillips
Assistant Attorney General

CC: All Parties of Record.

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
UNITED CITIES GAS COMPANY,)	
a Division of ATMOS ENERGY)	
CORPORATION INCENTIVE PLAN)	
ACCOUNT (IPA) AUDIT)	CONSOLIDATED DOCKET NOS.
)	01-00704 and 02-00850
UNITED CITIES GAS COMPANY,)	
a Division of ATMOS ENERGY)	
CORPORATION, PETITION)	
TO AMEND THE PERFORMANCE)	
BASED RATEMAKING)	
MECHANISM RIDER)	

CONSUMER ADVOCATE’S MOTION TO COMPEL DISCOVERY

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), pursuant to Rule 37.01(2) of the Tennessee Rules of Civil Procedure, Tennessee Regulatory Authority Rule 1220-1-2-.11(9), and the Hearing Officer’s ruling of May 10, 2004, and hereby respectfully moves to compel Atmos Energy Corporation (“AEC”) and the Staff legal counsel of the Tennessee Regulatory Authority (“TRA Staff”) to fully and completely answer and respond to the discovery requests that are the subject of this Motion.

I. INTRODUCTION

In accordance with the procedural schedule established by the Hearing Officer, the Consumer Advocate filed its first round of discovery requests and served them to AEC and the TRA Staff on April 30, 2004. AEC and the TRA Staff filed responses and served them to the Consumer Advocate

on May 7, 2004.¹

In its responses, AEC and the TRA Staff raised several objections to many of the Consumer Advocate's discovery requests.² In addition, the Consumer Advocate finds AEC's and the TRA Staff's responses to certain other requests to be inadequate or incomplete. The Consumer Advocate has previously sought to work through these discovery disputes informally. As of May 10, 2004, AEC and the TRA Staff and the Consumer Advocate have not been able to satisfactorily resolve the discovery requests that are the subject of this Motion.

II. STANDARD FOR DISCOVERY

Tennessee has a broad policy which favors the discovery of any relevant information:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tenn. R. Civ. P. 26.02(1). Thus, evidence does not have to be admissible to be discoverable as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Today, it is through discovery rather than pleadings that the parties attempt "to find the truth

¹ AEC's responses were not actually filed until May 10, 2004, at the request of the Hearing Officer.

² Consistent with the procedural schedule on May 5, 2004, AEC and the TRA Staff objected to Request for Production numbered 2 and 4. The TRA Staff objected to Interrogatory numbered 1. AEC objected to Interrogatories numbered 1 and 7. On May 7, 2004, AEC objected to Interrogatory numbered 3 outside the time period described in the Hearing Officer's Order.

and to prepare for the disposition of the case in favor of the party who is justly deserving of a judgment.” *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc* , 2002 WL 1389615 at *3 (Tenn. Ct. App. 2002) (quoting Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962)). Accordingly, a party seeking discovery is entitled to obtain any information that is relevant to the case and not privileged. *See Id.* Consistent with Tennessee’s open discovery policy, the relevancy requirement is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case’s issues.” *Id.* Discovery therefore is not limited to the issues raised by the pleadings. *See Id.*, *see also Shipley v. Tennessee Farmers Mutual Ins. Co.*, 1991 WL 77540 at *7-8 (Tenn. Ct. App. 1991). A party may also use discovery to: define and clarify the issues; probe a variety of fact-oriented issues that are not related to the merits of the case; formulate and interject additional issues into the case which relate to the subject matter of the pleadings; and determine additional causes of actions or claims which need to be or can be asserted against a party or against third parties. *See Shipley*, 1991 WL 77540 at *7-8 (quoting *Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

It is nonetheless recognized that the trial court may limit discovery under appropriate circumstances. Because of the broad policy favoring discovery, however, the trial court should not order limitations on discovery unless the party opposing discovery can demonstrate with more than conclusory statements and generalizations that the discovery limitations are necessary to protect the party from annoyance, embarrassment, oppression, or undue burden and expense. *See Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1991). The trial court should decline to limit discovery if the party opposing discovery cannot produce specific facts to support the requested limitations. *See Id.* Moreover, given the liberal construction of discovery rules, the trial court should

approach any request for limitations with common sense rather than with narrow legalisms, basing the reasonableness of any ordered limitations on the character of the information sought, the issues involved, and the procedural posture of the case. *See Id.* Rather than denying discovery outright, it is appropriate for the trial court to fashion remedies to discovery issues by balancing the competing interests and hardships of the parties and by considering whether there are less burdensome means for acquiring the requested information. *See Id.*

III. THE TRA SHOULD COMPEL AEC AND THE TRA STAFF TO RESPOND TO THE CONSUMER ADVOCATE'S DISCOVERY REQUESTS

AEC and the TRA Staff have submitted a joint motion to the TRA seeking approval of a settlement agreement negotiated between them as parties in this contested matter. The Consumer Advocate is a party to this contested matter, but is not a party to the settlement agreement. The Consumer Advocate objects to this settlement agreement.

As the only grounds supporting their motion for approval of the settlement agreement AEC and the TRA Staff cite as grounds, on unnumbered page 3:

“In summary, approval of the Settlement Agreement is necessary and proper for the public convenience and properly serves the public interest.”

In an effort to obtain information that is necessary for the TRA to fulfill its responsibilities, the Consumer Advocate fashioned its discovery requests to obtain information regarding the ground for approval set out in the motion. The Consumer Advocate's discovery requests were calculated to define and clarify the issues, probe the factual basis of the motion, and formulate issues which the Consumer Advocate believes should be considered in review of the motion. Accordingly, the Consumer Advocate's requests are calculated to lead to the discovery of admissible evidence in the TRA's review of the motion. There is little question that AEC and the TRA Staff failed to followed

the procedural rules of the TRA in fashioning the motion.³ In accord with TRA Rule 1220-1-2-.06, AEC and the TRA Staff are required state the ground(s) for granting of their motion. Further, the Hearing Officer in this matter clearly ordered the same on May 10, 2004.

In the supplemental filings of May 11, 2004, neither party completes the task assigned. The only clear statement regarding the proper ground for granting the motion is set out in the response by AEC and the TRA Staff filed and served on May 5, 2004, where each disavow the very ground on which their motion for approval is predicated. The supplemental filings of May 11, 2004, merely suggest that the new tariff must stand the rigors of process and standards set out in Tennessee Code Annotated §§, 65-4-117, 65-5-201 and 65-5-203. However, both AEC and the TRA Staff also appear to suggest that there is no standard for approval of the settlement agreement attached to their motion. The TRA Staff infers that some standard exist within the settlement agreements attached to its filing, but does not attempt to glean from the attached documents the standard. Each party's loose reference to other agreements creates a tremendous problem. The Consumer Advocate does not know what ground the parties rely on in seeking approval of their motion. The parties are free to invent most anything as grounds for the motion in their reply. The rules of discovery and TRA Rule 1220-1-2-.06 were designed expressly to prevent this absurd result.

Whether AEC or the TRA Staff are intentionally hiding information from the Consumer Advocate and the Hearing Officer, or more likely no grounds exist for approval of this settlement agreement because all parties to this contested case are not in agreement, the result is the same.⁴

³ The policy behind this rule includes matters of judicial economy and of particular importance fairness.

⁴ The Consumer Advocate has looked and so far has been unable to find a settlement agreement that was approved by the TRA short of a hearing on the merits, where all interested parties were not in agreement.

Until AEC and the TRA Staff settle on a standard which forms the ground(s) for granting their motion the Consumer Advocate should not be required to respond.⁵ Additionally, AEC and the TRA Staff should be ordered to properly respond to the subject discovery.⁶

For these reasons and the reasons set forth below, the Consumer Advocate respectfully requests the TRA to enter an order compelling AEC and the TRA Staff to respond to the Consumer Advocate's discovery requests:

Request to Produce No. 1:

Consumer Advocate's Request to AEC: Copies of any and all documents identified in your answers or responses to these Interrogatories.

Response of AEC: AEC identifies "transportation contracts at issue" in response to Interrogatory numbered 3, but does not provide them as attachments to the Request to Produce.

Grounds supporting motion: AEC identifies the "contracts" but has not provided them or specified that the "contracts" were previously submitted to the Consumer Advocate. A proper response to this request and the interrogatory would have identified the universe of "contracts" referenced by AEC and attach copies.

Interrogatory No. 6:

⁵ AEC and the TRA Staff having failed to provide an adequate supplemental pleading by the time specified by the Hearing Officer, the Consumer Advocate does not have time to file an appropriate responsive pleading. The Consumer Advocate was already under an unreasonable time constraint. The Consumer Advocate does not have the transcript of the proceedings on May 10, 2004. In addition to the discussion regarding the ground(s) upon which the subject motion travels, the Consumer Advocate requests that the Hearing Officer direct that all further supplemental responses ordered to be served by May 11, 2004 be directed to the Consumer Advocate immediately.

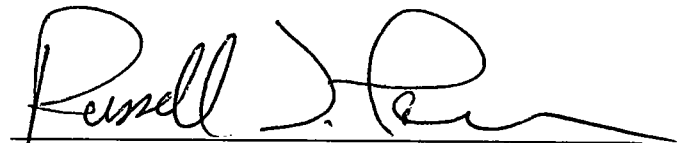
⁶ Considering that the motion of AEC and the TRA Staff is defective it should be denied. In the alternative, AEC and the TRA Staff should withdraw the motion and refile it in proper form. Without these curative measures, any decision will be clouded.

Consumer Advocate's Request to AEC and the TRA Staff: Explain in detail the extent to which FERC Order: Modification of Negotiated Rate Policy, Natural Gas Pipeline Negotiated Rate Policies and Practices, 104 FERC ¶ 61,134 (2003) may be relevant to the question of whether the proposed settlement is in the public interest.

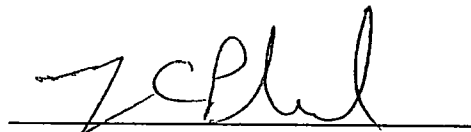
Response of AEC and the TRA Staff: Each party declares that the subject order is not relevant.

Grounds supporting motion: Neither party explains in detail the extent to which the order is not relevant. Had the question simply called for a yes or no on whether the order was relevant the effort might be responsive. However, the interrogatory goes further in seeking an explanation of the extent that the order may be relevant. If AEC and the TRA Staff truly believe the order is not relevant then each must explain why.

FOR THE STATE OF TENNESSEE:



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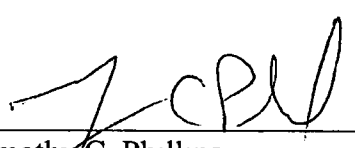
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, facsimile or hand delivery on May 12, 2004.

Honorable Deborah Taylor Tate
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